

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ESTHER L. SULLEN,

No. C 10-5898 CW

Plaintiff,

ORDER DENYING
PLAINTIFF'S MOTION
FOR SUMMARY
JUDGMENT OR FOR
REMAND AND
GRANTING
DEFENDANT'S CROSS-
MOTION FOR SUMMARY
JUDGMENT

V.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

Plaintiff Esther L. Sullen moves for summary judgment or for remand in this social security appeal on the ground that the Administrative Law Judge (ALJ) failed to develop the record in regard to her mental functional capacity and failed to provide adequate reasons for rejecting her testimony regarding her symptoms of depression. Defendant Michael J. Astrue in his capacity as Commissioner of the Social Security Administration (SSA) opposes Plaintiff's motion and cross-moves for summary judgment. Plaintiff has not filed a reply. Having considered all the papers filed by the parties, the Court denies Plaintiff's motion for summary judgment or for remand, and grants the Commissioner's cross-motion for summary judgment.

BACKGROUND

In August 2007, Plaintiff filed applications for disability insurance benefits (DIB) and supplemental security benefits (SSI) under Titles II and XVI of the Social Security Act, alleging that she became disabled in December 2005 due to tendonitis, back

1 problems, anemia, manic depressive disorder, knee problems, asthma
2 and bronchitis. AR 141, 151. The applications were denied
3 initially, on reconsideration and, after a hearing, by an ALJ in a
4 decision dated June 14, 2010. At the hearing before the ALJ,
5 Plaintiff's counsel asked the ALJ to order a consultative
6 examination (CE) to determine Plaintiff's mental impairments. The
7 ALJ declined to order a mental CE, but stated that he would hold
8 the case open for thirty days to wait for any additional records
9 from Plaintiff. Plaintiff did not file additional evidence of her
10 mental impairments. The ALJ's denial of benefits became the final
11 decision of the Commissioner when the Appeals Council denied
12 review.

13 At the time of the ALJ decision, Plaintiff was forty-three
14 years old. She has a high school education and past relevant work
15 as a merchandiser, customer service representative, dispatcher and
16 car jockey. She lives with her children who, at the time of the
17 hearing, were fourteen and sixteen years old. Plaintiff has
18 received treatment for physical and mental impairments, but only
19 appeals the ALJ's order in regard to her mental impairments.

20 In January 2007, Plaintiff began treatment for complaints of
21 depression and stress at the Schuman-Liles Clinic. Administrative
22 Record (AR) 348-51. Her reported symptoms included crying, sleep
23 disturbance, anergia (lack of energy), poor concentration and poor
24 memory. Dr. Stefan Lampe, a psychiatrist, completed a mental
25 status intake exam, in which he noted Plaintiff's sickly
26 appearance, psychomotor retardation, depressed mood and
27 constricted affect. AR 349. Dr. Lampe also noted that Plaintiff
28 had normal speech, no perceptual disturbances and normal thought

1 content. He indicated that she was alert and was of normal
2 intelligence. AR 350-51. Dr. Lampe diagnosed a Major Depressive
3 Disorder, Recurrent, Severe without psychotic features. AR 352.
4 His treatment plan consisted of prescribing Prozac, for treating
5 Plaintiff's depression, and Restoril, for treating her insomnia.
6 AR 352.

7 At first, Plaintiff's response to this treatment was rated
8 "fair." AR 344 (August 17, 2007). After several months, Dr.
9 Lampe noted that Plaintiff's response to treatment was good. See
10 AR 340 (December 5, 2007), AR 338 (June 5, 2008), AR 336 (July 3,
11 2008), AR 334 (March 3, 2009), AR 332 (May 20, 2009) and AR 330
12 (October 6, 2009).

13 On October 13, 2007, Plaintiff was examined for physical and
14 mental impairments at the request of the SSA. In terms of mental
15 status, the examiner found that Plaintiff was alert and oriented
16 to time, place and person. AR 248. Her memory recall was three
17 of three words immediately and two of three words at five minutes.
18 AR 248. The examiner did not include mental limitations in his
19 functional capacity assessment. AR 249. On November 1, 2007, Dr.
20 Danilo Lucila, MD, completed a psychiatric review technique form
21 about Plaintiff on behalf of the SSA. Dr. Danilo indicated that
22 Plaintiff's impairment was "not severe," that she had an
23 "affective disorder," that her functional limitations were mild in
24 the areas of activities of daily living, social functioning and
25 maintaining concentration, persistence or pace, and that she had
26 no functional limitation due to episodes of decompensation. AR
27 269. He wrote that Plaintiff was in treatment for mental health
28 issues, appeared to have stabilized, and was "practically"

1 asymptomatic, . . . she can relate adequately. Impairment is non-
2 severe." AR 259.

3 From June 2008 to February 2009, Plaintiff saw Sarah
4 Weinberg, L.C.S.W., for counseling. AR 319. In June 2008, Ms.
5 Weinberg's diagnosis of Plaintiff was Major Depression, Recurrent.
6 AR 316. On May 5, 2009, Ms. Weinberg completed a mental
7 impairment questionnaire indicating that Plaintiff's symptoms
8 consisted of a short attention span, auditory hallucinations,
9 sleep disorder, crying, tiredness, lack of energy and
10 irritability. Her diagnosis of Plaintiff continued to be Major
11 Depression, Recurrent, with a Global Assessment of Functioning
12 (GAF) of 60, indicating only moderate difficulties in functioning
13 due to mental impairments. AR 361. She also indicated that
14 Plaintiff's understanding, memory, sustained concentration,
15 persistence, social interaction and adaptation were all impaired
16 by total distraction such that Plaintiff was not able to perform
17 work-related mental functions. AR 362-63.

18 On March 14, 2010, Plaintiff underwent a neurological
19 consultative examination at the request of the SSA. In regard to
20 mental functioning, the examiner found that Plaintiff's mental
21 status was normal and that she was alert and "well oriented to
22 person with good higher cognitive functions." AR 383. He noted
23 that she had a history of anxiety and depression, but made no
24 other comment regarding her mental functioning. AR 383-84.

25 **LEGAL STANDARD**

26 A court may set aside the Commissioner's denial of disability
27 benefits only when his findings are based on legal error or are
28 not supported by substantial evidence in the record as a whole.

1 42 U.S.C. § 405(g); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th
2 Cir. 1999). Substantial evidence is defined as "more than a mere
3 scintilla but less than a preponderance." Id. at 1098. The court
4 must consider the entire record, weighing both the evidence that
5 supports and that which contradicts the Commissioner's conclusion.
6 Id.

7 Even when a decision is supported by substantial evidence in
8 the record, it "should be set aside if the proper legal standards
9 were not applied in weighing the evidence and making the
10 decision." Benitez v. Califano, 573 F.2d 653, 655 (9th Cir. 1978)
11 (citing Flake v. Gardner, 399 F.2d 532, 540 (9th Cir. 1968)).
12 Under SSA regulations, the Commissioner must apply a five-step
13 sequential process to evaluate a disability benefits claim.¹ The
14 claimant bears the burden of proof in steps one through four.
15 Bustamante v. Massanari, 262 F.3d 949, 953-954 (9th Cir. 2001).
16 The burden shifts to the Commissioner in step five. Id. at 954.
17

18

¹ The five steps of the inquiry are

- 19 1. Is the claimant presently working in a substantially gainful
20 activity? If so, then the claimant is not disabled within
21 the meaning of the Social Security Act. If not, proceed to
22 step two. See 20 C.F.R. § 416.920(b).
- 23 2. Is the claimant's impairment severe? If so, proceed to step
24 three. If not, then the claimant is not disabled. See 20
25 C.F.R. § 416.920(c).
- 26 3. Does the impairment "meet or equal" one of a list of
27 specific impairments described in 20 C.F.R. Part 220,
28 Subpart P, Appendix 1? If so, then the claimant is
disabled. If not, proceed to step four. See 20 C.F.R.
§ 416.920(d).
4. Is the claimant able to do any work that he or she has done
in the past? If so, then the claimant is not disabled. If
not, proceed to step five. See 20 C.F.R. § 416.920(e).
5. Is the claimant able to do any other work? If so, then the
claimant is not disabled. If not, then the claimant is
disabled. See 20 C.F.R. § 416.920(f).

1 ALJ'S DECISION
2

3 At step one of the sequential process, the ALJ found that
4 Plaintiff had not worked since the alleged onset date. AR 17. At
5 step two, the ALJ found that Plaintiff had severe impairments of
6 mild degenerative joint disease of the hands, obesity, asthma,
7 degenerative disc disease of the cervical spine and depression.
8 AR 17. At step three, the ALJ found that Plaintiff's impairments
9 or combination of impairments did not meet or medically equal one
of the listed impairments described in the regulations.

10 At step four, based on the medical evidence and the
11 intensity, persistence and limiting effects of Plaintiff's
12 symptoms, the ALJ determined Plaintiff's residual functioning
13 capacity (RFC). AR at 18. The ALJ found that Plaintiff had the
14 physical RFC to do light work with various postural limitations
15 and with the mental restrictions to simple, routine, and
16 repetitive tasks involving only simple decisions with few, if any,
17 workplace changes. AR 18. The ALJ based his determination of
18 Plaintiff's mental RFC on her testimony at the hearing and on her
19 statements in the September 2007 function report she completed.
20 The ALJ found that Plaintiff had mild restrictions in her
21 activities of daily living as demonstrated by her ability to
22 function as a single parent, handle bills and make shopping lists;
23 that she had moderate difficulties in maintaining social
24 functioning based on her ability to socialize with friends and
25 attend church; and that she had moderate difficulties in
26 maintaining concentration, persistence or pace based on her
27 testimony that she has difficulty in focusing. AR 18. The ALJ
28 also based his RFC determination upon the Schuman-Liles Clinic

1 progress records which indicated Plaintiff's good response to
2 medication and mental status exams that were substantially within
3 normal limits. AR 20.

4 At the hearing before the ALJ, a vocational expert (VE)
5 testified that an individual with Plaintiff's age, education, work
6 experience and RFC could not perform Plaintiff's past work. The
7 ALJ adopted the VE's testimony and found that Plaintiff could not
8 engage in any past relevant work. AR 21-22. At step five, the
9 ALJ relied on the testimony of the VE and found that Plaintiff
10 retained the ability to perform several "light" jobs existing in
11 significant numbers in the national and local economies, such as a
12 photocopy machine operator, electrical assembler and toy stuffer.
13 On this basis, the ALJ found that Plaintiff was not disabled under
14 the Social Security Act. AR 22.

DISCUSSION

I. ALJ's Duty to Develop the Record

17 Plaintiff argues that the ALJ should have arranged for a
18 psychiatric CE to determine her mental RFC because the ALJ
19 rejected the opinions of both Ms. Weinberg and the state agency
20 physicians and there was no other assessment of Plaintiff's mental
21 RFC in the record. Defendant responds that a psychiatric CE was
22 unnecessary because (1) there was sufficient evidence in the
23 record to support the ALJ's finding that Plaintiff was mentally
24 limited to simple, routine tasks and (2) the ALJ left the record
25 open after the hearing to allow Plaintiff and her attorney the
26 opportunity to submit additional evidence, see AR 27. Defendant
27 argues that this discharged any duty to develop the record that
28 the ALJ might have had.

1 In social security cases, an ALJ has the duty to develop the
2 record fully and fairly and to ensure that the claimant's
3 interests are considered, even when the claimant is represented by
4 counsel. Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001).
5 One of the methods an ALJ has to develop the record is to order a
6 CE at the SSA's expense. Reed v. Massanari, 270 F.3d 838, 841
7 (9th Cir. 2001). However, the burden of proving disability lies
8 with the claimant so that the ALJ's duty to develop the record is
9 triggered only when there is ambiguous evidence or when the record
10 is inadequate to allow for proper evaluation of the evidence.
11 Mayes, 276 F.3d at 459. The ALJ may discharge this duty in
12 several ways including: subpoenaing the claimant's physicians,
13 submitting questions to the claimant's physicians, continuing the
14 hearing or keeping the record open after the hearing to allow
15 supplementation of the record. Tonapetyan v. Halter, 242 F.3d
16 1144, 1150 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 602
17 (9th Cir. 1998) (ALJ's indication to plaintiff and her counsel
18 that he would keep the record open so that they could supplement
19 her doctor's report fulfilled ALJ's duty to supplement the
20 record).

21 The ALJ considered all of the record evidence regarding
22 Plaintiff's mental functioning. He noted that she began receiving
23 mental health treatment at the Schuman-Liles Clinic beginning in
24 2007, where Dr. Lampe diagnosed major depressive disorder, that
25 later progress notes showed that Plaintiff responded well to
26 medication, that, by May 2007, her mental status exam was within
27 normal limits and that a 2010 neurological report indicated no
28 mental impairments. AR 20 (citing AR 293). The ALJ also

1 considered Plaintiff's treatment with Ms. Weinberg and the mental
2 health questionnaire she completed, which he disregarded.
3 Plaintiff does not dispute that the ALJ properly gave little
4 weight to Ms. Weinberg's opinion.

5 Given Plaintiff's minimal mental health treatment, consisting
6 of anti-depressant medication and visits with a social worker, and
7 considering that Plaintiff's mental functioning had improved as a
8 result of the treatment, the ALJ could have adopted the opinion of
9 the state examiners who found that her symptoms were not severe.
10 However, after considering Plaintiff's testimony, her self-
11 assessment, and the medical record, he found that she had some
12 mental limitations which he included in his RFC. The record was
13 not ambiguous or inadequate to allow for evaluation and, thus, the
14 ALJ had no duty to develop it further.

15 Furthermore, at the hearing, the ALJ told Plaintiff's counsel
16 that, although he would not order a mental CE, he would keep the
17 record open for at least thirty days so that Plaintiff could
18 submit additional evidence. See AR 27. Thus, Plaintiff had the
19 opportunity to submit additional evidence of her mental
20 impairment, but chose not to do so. The fact that the ALJ kept
21 the record open after the hearing for Plaintiff to submit
22 additional evidence is sufficient to satisfy any duty to develop
23 the record.

24 **II. Plaintiff's Credibility**

25 Plaintiff argues that the ALJ improperly rejected her
26 testimony regarding her symptoms of depression. She argues that
27 the record shows that she suffers from a severe, recurrent major
28 depressive disorder, which produces significant and debilitating

1 symptoms. She points out that she described these symptoms in her
2 testimony, which the ALJ rejected without providing any reasons.

3 "In deciding whether to accept a claimant's subjective
4 symptom testimony, an ALJ must perform two stages of analysis:
5 the Cotton analysis and an analysis of the credibility of the
6 claimant's testimony regarding the severity of her symptoms."
7 Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996) (citing
8 Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)). The Cotton test
9 is a threshold test which requires the claimant who alleges
10 disability based on subjective symptoms to produce objective
11 medical evidence of an underlying impairment which could
12 reasonably be expected to produce the pain or other symptoms
13 alleged. Id. Once the claimant produces medical evidence of an
14 underlying impairment, the ALJ may only reject the claimant's
15 testimony if there is evidence that the claimant is malingering or
16 by offering specific, clear and convincing reasons for doing so.
17 Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); SSR 96-7p. To
18 determine a claimant's credibility regarding the severity of his
19 or her symptoms, the ALJ may consider, "(1) ordinary techniques of
20 credibility evaluation, such as the claimant's reputation for
21 lying, prior inconsistent statements concerning the symptoms, and
22 other testimony by the claimant that appears less than candid;
23 (2) unexplained or inadequately explained failure to seek
24 treatment or to follow a prescribed course of treatment; and
25 (3) the claimant's daily activities." Smolen, 80 F.3d at 1284.

26 The mental health evidence, including treatment notes showing
27 that Plaintiff was improving from treatment with anti-depressant
28 medication and a recent neurological examination indicating no

1 problems with mental functioning, show that Plaintiff barely met
2 the Cotton requirement to produce objective medical evidence of an
3 underlying impairment. In fact, there is no evidence of mental
4 impairment for the first year of Plaintiff's claimed disability
5 because her mental health treatment began in January 2007, one
6 year after the December 2005 alleged disability onset date.

7 Furthermore, the ALJ did not disregard all of Plaintiff's
8 testimony; he found Plaintiff's statements concerning the
9 intensity, persistence and limiting effects of her mental symptoms
10 to be not credible only to the extent they were inconsistent with
11 the ALJ's RFC assessment. AR at 20-21. The ALJ provided several
12 reasons for his finding of partial credibility. Most importantly,
13 he noted the sparse and relatively normal mental health evidence.
14 The ALJ also considered Plaintiff's activities of daily living, in
15 that she helped her children get ready for school, helped them
16 with their homework, made groceries lists and attended church. AR
17 18. Finally, the ALJ noted that Plaintiff testified that she was
18 laid off from her last job as a dispatcher because her "temp"
19 agency went out of business and that she then, unsuccessfully,
20 attempted to gain other employment. Although he did not
21 explicitly say so, the ALJ apparently inferred that this testimony
22 contradicted Plaintiff's allegation that she was unable to work
23 because of mental limitations.

24 These reasons are sufficient to support the ALJ's finding
25 that Plaintiff's testimony regarding her mental health symptoms
26 was only partially credible.

27
28

1 CONCLUSION

2 Based on the foregoing, Defendant's cross-motion for summary
3 judgment is granted and Plaintiff's motion for summary judgment or
4 for remand is denied. Judgment shall enter accordingly. The
5 parties shall bear their own costs.

6

7 IT IS SO ORDERED.

8

9 Dated: 3/13/2012


10 CLAUDIA WILKEN
11 United States District Judge